No. 14839

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOMIS LEMON ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SOMIS LEMON ASSOCIATION,

Respondent.

Petition for Review and Petition for Enforcement of Order of National Labor Relations Board.

Brief of Petitioner, Somis Lemon Association.

IVAN G. McDANIEL,
KENNETH N. DELLAMATER,
1020 Pacific Finance Building,
621 South Hope Street,
Los Angeles 17, California,
Attorneys for Petitioner, Somis Lemon Association.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

Statutes

No. 14839

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOMIS LEMON ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SOMIS LEMON ASSOCIATION,

Respondent.

Petition for Review and Petition for Enforcement of Order of National Labor Relations Board.

Brief of Petitioner, Somis Lemon Association.

Preliminary Statement.

A. Jurisdiction.

The matter to which review is sought consists of a Decision and Order dated April 13, 1955 [Tr. 69-72],[1] made

---

[1]Transcript of Record.

by the National Labor Relations Board (hereinafter called the "Board") in a proceeding entitled Somis Lemon Association (hereinafter called "Petitioner") and United Fresh Fruit & Vegetable Workers, LIU No. 78, CIO (hereinafter called the "Fruit & Vegetable Union"), case number 21-CA-1913, holding that Petitioner had committed unfair labor practices and had refused to bargain with the said Union.

The Petitioner praying that the Order of the Board be set aside was filed under the provisions of Section 101.14 of the Rules and Regulations of the Board, and under the provisions of Section 10(f) of the Labor Management Relations Act, 1947, and in compliance with Rule 34 of the Rules of the United States Court of Appeals for the Ninth Circuit, as amended, effective January 1, 1949.

The above Act of Congress, approved June 23, 1947, known and designated as the "Labor Management Relations Act, 1947" (29 U. S. C. A., Sec. 141), provides as follows as to review of this Order:

> "Sec. 10(f). Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside." (29 U. S. C. A., Sec. 160(f).)

B. Statement of the Case.

Petitioner is a California cooperative non-profit association with its principal place of business in Oxnard, California, where it is engaged in processing and packing citrus fruits [Tr. 11-15].

On November 4, 1953, Petitioner's employees elected said Fruit & Vegetable Union as their bargaining representative [Tr. 6]. On November 13, 1953, the Board certified said Fruit & Vegetable Union as the employees' exclusive bargaining representative [Tr. 8-9].

Bargaining meetings were held between Petitioner and said Fruit & Vegetable Union on December 9, 1953, January 8, 21, and February 4, 1954 [Tr. 56]. An impassé was reached at the February 4, 1954, meeting and bargaining was discontinued [Tr. 126, 127, 129, 148, 156, 158-159]. On February 22, 1954, a petition signed by about 60% of the employees and repudiating said Union was served on Petitioner [Tr. 58, 129, 130, 24]. Charges were filed by said Fruit & Vegetable Union against Petitioner on February 8, 1954, alleging refusal to bargain with said Union [Tr. 9-10]. Complaint was issued by the Board on or about May 28, 1954 [Tr. 11-12] and hearing was had before Trial Examiner Wallace E. Royster, in Oxnard, California, on September 28 and 29, 1954 [Tr. 53-54].

Petitioner filed written Exceptions to the Trial Examiner's Findings that it committed unfair labor practices: (1) by refusal to bargain with said Fruit & Vegetable

Union; (2) by granting a unilateral wage increase, and (3) to his recommendations that petitioner bargain with the United Packinghouse Workers of America, Local No. 78, CIO (hereinafter referred to as the "Meatpackers Local") [Tr. 67-68].

The Board affirmed the Rulings and Recommendations of the Trial Examiner and ordered Petitioner to bargain with the said Meatpackers Local [Tr. 71].

Petitioner thereafter filed its Petition for Review with the above entitled court [Tr. 76].

C. Specifications of Error.

The Board erred in affirming the Findings, Conclusions and Recommendations of the Trial Examiner as follows: (1) that the said Meatpackers Local is the exclusive bargaining representative of Petitioner's employees; (2) that Petitioner committed unfair labor practices by refusal to bargain with the said Meatpackers Local; (3) in recommending that in the future Petitioner bargain with said Meatpackers Local; (4) that Petitioner committed unfair labor practices by making a unilateral wage increase; (5) that Petitioner engaged in unfair labor practices within the meaning of 8(a) (1) and (5) of the Labor Management Relations Act [Tr. 79-80].

ARGUMENT.

I.

The Union Is Not the One Elected by the Employees and Is Not a Bargaining Representative of the Employees' "Own Choosing."

Employees have the statutory right "to bargain collectively through representatives of their own choosing." (Sec. 7, Labor Management Relations Act, 1947, 29 U. S. C. A., Sec. 157.)

The instant point is presented in support of Petitioner's Exceptions to the Board's Findings and Conclusions that Petitioner committed unfair labor practices by refusal to bargain with said Meatpackers Local, and to the Board's Order that Petitioner:

> "Upon request, bargain collectively with Union Packinghouse Workers of America, Local 78, CIO, as the exclusive representative of the employees in the appropriate unit described above, and if an understanding is reached embody such understanding in a signed agreement." [Tr. 71.]

The Unions involved herein, namely, the said Fruit & Vegetable Union, the said Meatpackers Local and the United Packinghouse Workers of America, CIO, an international union (hereinafter called the "Meatpackers International") are the same unions that are referred to in the related case of Santa Clara Lemon Association, No. 14840.

The facts in this case are substantially the same on the above issue as the facts in the *Santa Clara* case. In the

instant case the Board approved the substitution of the Meatpackers' Local "For the reasons set forth in Santa Clara Lemon Association," etc. [Tr. 70, footnote 1].

Therefore, we incorporate herein by reference and make a part hereof as though set forth herein in full the argument appearing on pages 5 through 24 of the Brief of Petitioner, Santa Clara Lemon Association, filed with the above entitled court on or about December 31, 1955 in Case No. 14840.

For the reasons heretofore stated the Board's Order that Petitioner bargain collectively with the said Meatpackers Local is contrary to law and in violation of the rights of the employees in the bargaining unit, and the Board's finding that Petitioner failed and refused, contrary to the Act, to bargain with the Meatpackers Local should be reversed.

II.

Granting the Unilateral, General Wage Increase Did Not Constitute an Unfair Labor Practice.

It was stipulated that general wage increases were granted on March 8, 1954, and on April 11, 1954 [Tr. 109]. Petitioner admits that it did not consult any Union about the wage increases [Tr. 103, 155].

The reasons for the wage increases and the circumstances surrounding them were explained in Petitioner's offer of proof [Tr. 130-132].

Petitioner stood between the demands of the said Fruit & Vegetable Union on one side and the demands of a majority of its employees on the other. Wage adjustments were made to meet the competition of other packing houses [Tr. 132]. The new wage rates of $1.15

for women and $1.35-$1.40 for men [Tr. 109] were established by ascertaining what other packing houses in the area were paying [Tr. 132].

The Trial Examiner considers that the purpose is immaterial even though the wage increase was made solely because of business necessity [Tr. 60]. The Board has not been so arbitrary. It has held that unilateral wage increases may be made when bargaining negotiations were in suspension.

In regard to the effect of a "suspension" of negotiations, the Board declared:

> "In these circumstances the respondent was under no duty to withhold normal action respecting wages pending consultation with the Union." (*Montgomery Ward & Co.,* 39 N. L. R. B. 229; *Westchester Newspapers, Inc.,* 26 N. L. R. B. 630)

In the instant case we have negotiations suspended as a result of an impassé. How soon the difficulty would be resolved by the Board, or by a court, or both, could not be foreseen. It might take a month, a year, or even two or three years. In the meantime the employees would be deprived of a wage increase. Petitioner's labor supply would be jeopardized by its inability to meet competitive wage rates. Should both Petitioner and the employees be penalized by a frozen wage scale throughout the period necessary to resolve the legal conflict?

Petitioner did the only thing that it could reasonably do under the circumstances. It made unilateral wage increases [Tr. 132].

For each of the above reasons there is no substantial evidence to support the Board's finding that Petitioner violated the Act by granting a unilateral wage increase.

III.

Bargaining Had Reached a Genuine Impassé, and Petitioner's Refusal to Bargain Further Was Not an Unfair Labor Practice.

The evidence is undisputed that bargaining meetings between the Fruit & Vegetable Union and Petitioner were held on December 9, 1953, January 8, January 21, and February 4, 1954 [Tr. 93-94-95, 98].

First Meeting—December 9, 1953.

The Fruit & Vegetable Union representative, Rose, was absent [Tr. 93, 110]. The chief shop stewards from each of the competitive packing houses were present [Tr. 110-111, 134]. Petitioner pointed out that certain of the shop stewards present were employees of competitive packing houses, and expressed its dissatisfaction with having representatives of competitors sitting in on its business meetings. However, Petitioner did not press the matter further [Tr. 111]. Copies of said Fruit & Vegetable Union proposal were distributed. The Fruit & Vegetable Union proposal was read and several questions were asked by the Petitioner [Tr. 111-112]. The shop stewards who were present pointed out that they did not have sufficient knowledge as to the meaning of various parts of the Fruit & Vegetable Union proposal and said they could not answer several questions of the Petitioner and could not fully explain the proposal. Therefore, it was agreed that the entire matter be put over to the next meeting, when Mr. Smith, the president of the Fruit & Vegetable Union, or Mr. Rose, would be present [Tr. 112, 133-134].

Second Meeting—January 8, 1954.

Mr. Rose was present to represent the Fruit & Vegetable Union, but his recollection of what occurred appears to have been in error in several respects. Rose testified that the Fruit & Vegetable Union proposal was read in full at the first meeting and not read at all at the second [Tr. 95]. Yet he admits that Mr. Smith, president of said Union, may have read the proposal at the second meeting [Tr. 106], and other witnesses testified that the proposal was read in whole by Smith, president of said Union, and discussed as each section was read [Tr. 113-114, 135-136]. Rose testified that Petitioner pointed out that it wanted the overtime exemption allowed under the "State Agricultural Code" [Tr. 94, 102], and that after checking into the matter the Fruit & Vegetable Union agreed to the Petitioner using the overtime exemptions provided in the "State Agricultural Code" [Tr. 102]. Yet the evidence showed that the exemption referred to was allowed under the Federal Wage and Hour Law and not under the State Agricultural Code [G. C. Ex.* 4, Tr. 46, 105]. Rose was also in error as to the parties present at the second meeting [Tr. 106].

Seniority was discussed [Tr. 94]. The Fruit & Vegetable Union requested that Petitioner submit its counter-proposals in full [Tr. 94, 101].

During the course of the meeting, many questions were asked by Petitioner's representatives and explained by Rose or Smith [Tr. 114]. The subjects discussed included Union shop, wages, hours and overtime, federal exemption as to overtime in the handling of perishable fruits,

---

*General Counsel's Exhibit.

holidays [Tr. 114-115, 141], wage classifications [Tr. 116], insurance, working conditions, variation in wage rates [Tr. 140-141], and union indemnity in case of its violation of the proposed no strike, no lockout clause [Tr. 138-139].

There was agreement in substance concerning leaves of absence, men in Armed Forces, transportation, safety, no strike no lockout [Tr. 135-138], and it was not expected that there would be any difficulty in reaching an agreement on grievance procedure [Tr. 148].

The Fruit & Vegetable Union indicated that it was uncertain as to who among its own group had suggested the proposed wage rates and classifications [Tr. 117]. The Fruit & Vegetable Union said that it would not discuss wages alone [Tr. 116, 141].

The Petitioner opposed the use of the check-off system [Tr. 151]. The Fruit & Vegetable Union asked for a complete set of Petitioner's counter proposals [Tr. 142].

Third Meeting—January 21, 1954.

The Fruit & Vegetable Union representative, Rose, testified as to this meeting and again his recollection appeared to be in error in several respects. Rose testified that counsel for Petitioner submitted a counter-proposal on hours and overtime [Tr. 95]. Yet he admitted that he might be mistaken as to whether or not counsel was present at the meeting [Tr. 107], and other evidence indicated that counsel was not present at the meeting [Tr. 117-118]. Rose testified that he repeated his request for a full set of Petitioner's counter-proposals, and erroneously stated that Petitioner's counsel refused at this meeting to submit counter-proposals in full [Tr. 95-96, 101, 142].

The subjects discussed included combination jobs [Tr. 96], a counter-proposal on hours and overtime, seniority, the exception of growers' farm families from the seniority clause, and the Union shop [Tr. 96].

Petitioner submitted counter-proposals on hours and overtime [G. C. Ex. 4, Tr. 46, 119, 141], and on seniority [G. C. Ex. 5, Tr. 47, 119-120, 141]. Rose stated that at the next meeting he would offer a Union counter-proposal on seniority, and Petitioner said that it would reconsider the counter-proposal which it had offered on seniority [Tr. 120]. Also discussed were combination jobs [Tr. 120-121] and the federal wage and hour overtime exemption [G. C. Ex. 4, Tr. 46, 118]. It appeared that there was a meeting of the minds on arbitration [Tr. 149].

Rose stated that it was necessary for the Fruit & Vegetable Union to have the Union shop provision in the contract but Petitioner replied that it did not feel that it should force people to join the said Fruit & Vegetable Union in order to hold their jobs [Tr. 119].

Rose requested that Petitioner submit a full set of counter-proposals and Petitioner replied that it would submit counter-proposals on the various subjects which appeared in the Fruit & Vegetable Union proposal but that for it to submit a full set of counter-proposals at one time would result in an unnecessary loss of work [Tr. 122].

Fourth Meeting—February 4, 1954.

Rose submitted an oral counter-proposal on seniority [Tr. 98, 123-124]. McDaniel (counsel for Petitioner) submitted a counter-proposal on the Union Shop [G. C. Ex. 6, Tr. 47, 98] and the Fruit & Vegetable Union rejected it [Tr. 99, 127].

Union security was discussed and had also been previously discussed at the first, second and third meetings [Tr. 125]. Rose explained that the Fruit & Vegetable Union had 200 or 300 contracts in existence and they each contained the Union shop clause. He said that the Union shop clause was the policy of the Fruit & Vegetable Union in all of its contracts and that the Fruit & Vegetable Union would not recede from that position. Petitioner explained that it did not believe employees should be forced to join the Fruit & Vegetable Union against their will [Tr. 125-126]. McDaniel asked Rose if the Fruit & Vegetable Union would recede from its demand for a Union shop and Rose said that he could not recede because it was the policy of the Fruit & Vegetable Union to have the Union Shop clause in its contract [Tr. 126].

McDaniel said that he did not see any use in proceeding further in view of the Fruit & Vegetable Union's position and he rejected Rose's suggestion to pass the Union shop subject and to continue for an area of agreement because the Union shop had previously been discussed at all meetings. McDaniel told Rose to contact him if there was any change in the Fruit & Vegetable Union's position [G. C. Ex. 9, Tr. 49, 126, 127, 129, 148, 153, 156, 158-159].

Meetings—Generally.

Seniority and Union shop were discussed at each of the meetings [Tr. 103, 155-156]. There was agreement in substance on leaves of absence, Armed Forces, transportation, safety, hours and overtime, combination jobs, and recognition [Tr. 127-128], but parties always returned to the Union shop question [Tr. 125].

Petitioner did not want to agree on seniority based on length of service alone [Tr. 144]. But Petitioner's counter-proposal on seniority [G. C. Ex. 5, Tr. 47] was made in the form presented in order that Petitioner would be protected so that during slow periods it could discharge or lay off employees who had less ability and were less efficient without the complication of length of service. Petitioner fully expressed its intentions and its interpretation of the counter-proposal to the said Fruit & Vegetable Union [Tr. 146-148].

There was only one counter-proposal submitted on the Union shop question. Petitioner wanted an open shop clause and the Fruit & Vegetable Union wanted a Union Shop clause [Tr. 147]. The Fruit & Vegetable Union did not offer to recede from its demand for a Union shop clause [Tr. 148]. Petitioner asked Rose on more than one occasion if he would recede from his remand for a Union shop and Rose said several times that all of the Fruit & Vegetable Union's other contracts had the Union shop clause and that the Fruit & Vegetable Union could not accept anything less than that [Tr. 148].

The above summary of the various meetings indicates clearly that the Union shop question was discussed at all of the meetings, was passed over while other subjects were discussed, and was again discussed on several occasions. The Fruit & Vegetable Union had made it clear that it did not intend to recede from its demand for a Union shop.

The Trial Examiner finds that:

> "I find that on February 4 bargaining between the parties had not reached a point of impassé in respect to wages, vacations, working conditions, and other

> subsidiary questions; that the Union by virtue of its representative status was entitled to an opportunity to attempt to persuade the Respondent to the point of agreement in these matters; and that refusal further to meet with the Union after that date foreclosed it from doing so." [Tr. 59.]

Petitioner submits that when the Union shop question had been discussed and then passed over to other subjects in the contract, and then discussed again, this having occurred at several meetings, and the Fruit & Vegetable Union continued to refuse to recede from its demand for a Union shop, Petitioner was justified in abstaining from further negotiations. Nothing in the law requires that there be either an impassé or agreement on any or all other subjects of the contract before negotiations can be terminated by impassé on a given subject—especially on one as important as the Union shop question.

In *N. L. R. B. v. Cambria Clay Products Co.* (C. A. 6, 1954), 215 F. 2d 48, 55, there was an impassé as a result of a deadlock on the Union shop issue. In holding that employer did not refuse to bargain, the court said:

> ". . . There was no refusal on the part of the company—after four months of negotiations—to bargain with the Union in violation of the Act for 'the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position.' National Labor Relations Board v. American National Insurance Co., 343 U. S. 395, 404, 72 S. Ct. 824, 829, 96 L. Ed. 1027."

* * * * * * * *

"When a genuine impassé is reached, an employer, unless conditions change, usually may abstain from further negotiations. National Labor Relations Board v. Norfolk Shipbuilding and Drydock Corp., 4 Cir., 195 F. 2d 632, 635."

* * * * * * * *

"As said by Judge Learned Hand in National Labor Relations Board v. Remington-Rand, Inc., 2 Cir., 94 F. 2d 862, 872: 'the act does not attempt to settle industrial disputes; it leaves the parties to the resultant of their opposed economic powers; and while it does force them to treat with each other, it may be assumed to contemplate only bona fide negotiation. Hence, it is no doubt true that it does not require further negotiation after it becomes apparent that a settlement is impossible. A Union may at times seek to give the appearance of wishing to treat, after it knows that all chance of agreement is gone; in such conflicts each side generally wishes to place the odium of rupture upon the other. Assuming, as urged by the Board, that a closed shop demand is a proper subject for bargaining, we do not believe that respondent was required to continue the discussion indefinitely. Both sides had endeavored for many months to agree and they were unable to do so. Neither side was required to accept the proposal made by the other. The same thing may be said for other matters in dispute, which had long been considered and discussed by the parties. As stated, the occurrences of this date, when taken into consideration with what had preceded, as must be done, do not justify the conclusion of a refusal to bargain.' National Labor Relations Board v. Algoma Plywood & Veneer Co., 7 Cir., 121 F. 2d 602, 606."

In *N. L. R. B. v. Algoma, etc.* (C. A. 7), 121 F. 2d 602, 606, where the deadlock was on the "closed shop"

issue, the court held that there was no refusal to bargain and stated:

> "During that period, as pointed out by the Board, numerous proposals and counter-proposals were made. The main stumbling block appears to have been the matter of the closed shop. Respondent proposed one kind of closed shop which the Union was either unable or unwilling to consummate, and the Union proposed another character of closed shop to which respondent would not agree. The Board states in its brief: '* * * When the Union's proposal reached the conference table for collective bargaining on June 13, 1939, it at once became apparent that respondent persisted in the same motives, rendering any genuine collective bargaining impossible. * * *.'
>
> "The fallacy of this reasoning is that the proposal had been on the conference table for 11 months.
>
> "As we understand, the Union proposals at the June 13 conference were substantially the same as those proposed in numerous conferences prior thereto. In fact, one of the Union members testified: 'We were instructed to take that agreement back to Mr. Perry,' thereby referring to the previous proposal. A member of the bargaining committee testified that the conversation on this date was about the same as that had at previous conferences. In fact, as already stated, and as found by the Board, such bargaining conferences had continued over a period of 11 months. The length of time an employer must continue to bargain in order to demonstrate its good faith, we do not know, but certainly the time is not indefinite. Assuming, as urged by the Board, that a closed shop demand is a proper subject for bargaining, we do not believe that respondent was required to continue the discussion indefinitely. Both sides had endeavored for many months to agree and they

were unable to do so. Neither side was required to accept the proposal made by the other. The same thing may be said for other matters in dispute, which had long been considered and discussed by the parties. As stated, the occurrences of this date, when taken into consideration with what had preceded, as must be done, do not justify the conclusion of a refusal to bargain."

In *N. L. R. B. v. Lightner Publishing Co.* (C. A. 7), 113 F. 2d 621, the court pointed out that the employer is not under a duty to accede to whatever particular terms may be sought by the Union, but merely to accord recognition to the bargaining representatives of the employees and conduct negotiations in good faith in an honest attempt to arrive at a mutually satisfactory agreement.

In *Shell Oil Co., 77* N. L. R B. 1306, the Board held that inability to agree on one particular issue does not constitute refusal to bargain in good faith. In that case the employer met with the Union, discussed all proposals and counter-proposals and reached agreement on a substantial number of issues.

In *Southern Prison Co.,* 46 N. L. R. B. 1268, the Board found that there was no refusal to bargain in good faith where the company considered the Union's proposals, offered counter-proposals and even though the company had granted individual wage increases during the period of the negotiations, which were made without discrimination and pursuant to a long established policy of the company.

In *Kentucky Tennessee Clay Co.,* 49 N. L. R. B. 252, the Board held that there was no refusal to bargain where the parties were hopelessly deadlocked on the Union shop, seniority and arbitration issues.

In *Anchor Rome Mills, Inc.*, 86 N. L. R. B. 1120, the Board held that there was no failure to bargain where there was an impassé with respect to check-off, super-seniority for shop steward and Union liability for strikes.

For each of the above reasons it is apparent that the Board's findings on said issues are not based on substantial evidence and are not in accordance with law, and therefore should be reversed.

Respectfully submitted,

IVAN G. MCDANIEL,
KENNETH N. DELLAMATER,
By KENNETH N. DELLAMATER,
Attorneys for Petitioner, Somis Lemon Association.